IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 485 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KACHARAJI DHARMAJI BHIL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MS FARHANA Y MANSURI for Appellant(s) : 1, Appointed by Legal Aid
MR. R.C.KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 23/10/2007, 19/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this Appeal under Section 374 of the Code of Criminal Procedure ("the Code" for short) is to the correctness of the judgment and order dated 15.4.1999 rendered in Sessions Case No. 99 of 1998 by the learned Additional Sessions Judge, Court No.10, Ahmedabad, by which the Appellant ("the Accused" for short) has been convicted for commission of the offence punishable under Section 302 of the Indian Penal Code ("IPC" for short) and sentenced to suffer imprisonment of life and fine of Rs.100/- in default of payment of fine to undergo further RI for one month.

2. The prosecution case as disclosed from FIR and unfolded during trial is as under:

(i) It is the case of the prosecution that prior to the incident, the Accused was residing with Kantaben though they were not husband and wife. They were residing together in the same house after the death of the husband of deceased Kantaben. It is the further case of the prosecution that on 1.12.1997, at about 12:00 hours in the noon the incident had taken place at Bhilwas, in the area of Sardarnagar, Ahmedabad. As per the further case of the prosecution, the Accused No.2 was related to the husband of deceased Kantaben and she was

occupying the house of Khemchand Kanaiyalal, i.e. Accused No.2, who was tried along with the Accused and has been acquitted of the offence with which he was charged. The Accused No.2 was in need of the said house, and with a view to get possession of the said house, he instigated the Accused. It is the further case of the prosecution that no negotiations were going on still however the Accused had forced Kantaben to vacate the house, and on her denial, the Accused poured kerosene on her person and set her ablaze. Thereafter, immediately, Kantaben was shifted to Hospital. During the course of her treatment, she lodged the complaint before PW-8 Bhimjibhai R Baranda, PSI of Sardarnagar Police Station, Ahmedabad City, which was recorded as per her narration and her signature was obtained beneath the same. The said complaint was on record at exh.23. Thereafter, PW-9 Baldevbhai Patel, Executive Magistrate was summoned for recording the dying declaration of Kantaben. After verifying from the concerned Doctor about her physical condition, he was satisfied that she was fit and conscious. He, thereafter recorded her dying declaration in absence of the relatives of Kantaben. The said dying declaration is on record at exh.28. During the course of her treatment, Kantaben has died, therefore inquest on the dead body of the deceased was held and accordingly inquest panchnama was prepared and the dead body was

sent for autopsy to Civil Hospital. Thereafter investigation was handed over to PW-10 - Babubhai Ishwarbhai Patel, Police Inspector of Sardarnagar Police Station. During the course of investigation, he has drawn the panchnama of the scene of offence, recorded statements of Gauriben, Kokilaben, Lakhansingh, Artiben, Gayatriben , Hirabhai and Kanjibhai, and thereafter Accused No.2 was arrested on 1.12.1997 whereas the Accused was arrested on 6.12.1997 and since he had also received burn injuries, after drawing the panchnama of his person, he was sent to hospital for medical treatment. As, sufficient incriminating evidence was found against the Accused for commission of the offence punishable under Section 302 IPC, he filed charge sheet in the Court of Metropolitan Magistrate, Ahmedabad.

(ii) As the offence under Section 302 is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the case to the Court of Sessions, Ahmedabad City. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against the Accused for commission of the offence punishable under Section 302 IPC.

(iii) The charge was read over and explained to the Accused. The Accused pleaded not guilty to the charge and claimed to be tried. Therefore, they were put to trial by the learned

Additional Sessions Judge, Ahmedabad in Sessions Case No. 99 of 1998.

(iv) In order to bring home the charge leveled against the Accused, the prosecution has examined in all 11 witnesses and relied upon their oral testimony, details of which have been narrated in paragraph 2 of the impugned judgment and order, they are as under:

PW No.	Name and Status	Exhibit	Page No.
1	Vijay Kishanchand	11	43
2	Gauriben Shivaji	14	45
3	Kokilaben Keshavlal	15	49
4	Rajubhai Hirabhai	16	53
5	Lakhansinh Fulsinh	17	57
6	Dr. Madhusudan Aatmaram Patel, Medical Officer	18	61
7	Dr. Rajendrakumar B Joshi, Medical Officer	20	63
8	Bhimjibhai R Baranda, PSI	22	65
9	Baldevbhai Patel, Mamlatdar	26	71
10	Babubhai Ishwarbhai Patel, PI / IO	32	77
11	Dr. Arun Kailashchandra Adha, Medical Officer	39	87

(v) To prove the culpability of the Accused, the prosecution has also produced number of documents and relied upon the contents of the same, the details of which are mentioned in second part of paragraph of the impugned

judgment and order. They are as under:

Srl. No.	Particulars	Exh.
1.	Panchnama of the scene of offence.	12
2.	Inquest Panchnama.	13
3.	Postmortem Note.	19
4.	Medical certificate of the Accused.	21
5.	Original complaint given by deceased Kantaben, which was recorded by PSI Baranda.	23
6.	Report under Section 157 of Cr.PC by which offence was registered.	24
7.	D.D. Of the deceased recorded by Executive Magistrate.	28
8.	Panchnama of physical condition of the Accused.	33
9.	Report of FSL.	34

(vi) After recording of evidence of the prosecution witnesses was over, the trial Court explained to the Accused persons, the circumstances appearing against them and recorded their further statement under Section 313 of the Code. In their further statement, the Accused persons denied the case of the prosecution in its entirety. They have stated that a false case has been filed against them. However, they have neither led any evidence nor examined any witness in support of their defence.

(vii) On appreciation, evaluation, analysis and scrutiny of the evidence on record, the

trial Court came to the conclusion that the Accused has poured the kerosene on the deceased Kantaben and set her ablaze to cause her death. Thus, involvement of the Accused in the offence of committing murder of Kantaben under Section 302 IPC has been proved by the prosecution, beyond reasonable doubt. The part of intention and knowledge both have been established, at the same time it is also proved that it is not a case of accidental or suicidal death but it is a case of homicidal death.

(viii) On the aforesaid finding, the trial Court has convicted the Accused for commission of the offence punishable under Section 302 IPC and sentenced to suffer imprisonment of life and fine of Rs.100/- in default to undergo further RI of one month, giving rise to instant Appeal at the instance of original Accused No.1.

(ix) The trial Court has also held that the involvement of the Accused No.2 for commission of the offence punishable under Section 302 read with Section 119 has not been proved, because it is not established by the prosecution, either by oral or documentary evidence, about the ownership of the property for which Accused No.2 was allegedly instigating the Accused to get it vacated by the deceased Kantaben. Not a single witness in this regard has been examined. The trial Court, therefore, has come to the conclusion that the prosecution has failed to establish that the Accused No.2 has instigated

the Accused to cause death of Kantaben, therefore, the trial Court has acquitted Accused No.2 of the offence with which he was charged.

3. It may be noted that the State has preferred Appeal being Criminal Appeal No. 609 of 1999 against the acquittal of Accused No.2. A Division Bench of this Court comprising M.R.Calla and Ravi R. Tripathi,JJ, vide order dated 28.10.1999 has held that no case is made out for grant of leave, therefore, leave has been refused and Appeal has been dismissed.

4. Ms. Farhana Y. Mansuri, learned advocate of the Accused has submitted that there is no eye witness to the incident. The case of the prosecution is based on the three sets of dying declarations made by deceased.

(i) One set of dying declaration is consisting of oral dying declaration alleged to have been made before PW-2 Gauriben Shivaji, PW-3 Kokilaben Keshavalal, PW-4 Rajubhai Hirabhai, PW-5 Lakhansinh Fulsinh.

(ii) The second set of dying declaration is in the nature of complaint (exh.23) which was alleged to have been made by the deceased before PW-8 Bhimjibhai R Baranda, PSI.

(iii) The third set of dying declaration is recorded by PW-9 Baldevbhai Patel, Executive Magistrate, which was alleged to have been made by the deceased before him.

5. According to Ms. Farhana Y. Mansuri, learned advocate of the Accused, so far as the first set of oral dying declaration is concerned, all the witnesses before whom alleged dying declaration was made by the deceased, have not supported the prosecution case. Therefore, the prosecution could not establish the complicity of the Accused on the basis of the said oral set of dying declarations. So far as dying declaration in the nature of Complaint (exh.23) and dying declaration recorded by PW-9 Executive Magistrate at exh.28 are concerned, they do not inspire confidence as the deceased was not in a fit physical condition to narrate before them, as the deceased had received 80% burn injuries of 1st, 2nd and 3rd degree all over her body except both feet and the deceased died because of shock and extensive burns. She, therefore, submitted that both the dying declarations are got up with a view to falsely rope the Accused in the offence of murder. She, therefore urged that the impugned judgment and order suffers from non-appreciation of evidence in its proper perspective, the same therefore, deserves to be quashed and set aside by allowing this Appeal and thereby acquitting the Accused of the offence with which he was charged.

6. In support of her aforesaid submissions, she has relied upon the following two reported decisions:

(i) Arvind Singh v. State of Bihar, 2001 (3)

Crimes 242 (SC).

(ii) State of Bihar v. Hare Ram Prasad & Ors., 2007 CRI.L.J 96.

7. In counter submission, Mr. R.C.Kodekar, learned APP for the Respondent – State of Gujarat has supported the impugned judgment and order by contending that there is no infirmity or illegality committed by the trial Court in appreciating the evidence of two sets of dying declarations; one in the form of a complaint (exh. 23) and another recorded by PW-9 Executive Magistrate at exh.28, Therefore, no interference is called for in the impugned judgment and order. He, therefore, urged to dismiss the Appeal by confirming the judgment and order of conviction and sentence recorded against the Accused by the trial Court.

8. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the Accused and infirmities pressed, scrupulously with a view to

find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

9. There is no dispute to the fact that the deceased died an unnatural death due to burn injuries. To prove this fact, the prosecution has examined and relied upon the oral testimony of PW-6 Dr. Madhusudan Atmaram Patel at exh. 14., who has inter alia testified that on 2.12.1997 he had received dead body of deceased Kantaben Shankerbhai from Sardarnagar Police Station. He performed autopsy on the dead body along with panel Doctor N.J.Joshi. On examination, following external injuries were found, which are narrated in column no.17 of PM note:

(i) 1st, 2nd and 3rd degree burns all over the body except both feet.

(ii) Venesection mark on left ankle on medial side.

(iii) Old scar in middle of parietal region (mid line).

He has further testified that the injuries were antemortem in nature. There were 81% burn injuries all over the body, the details of which have been given in column no. 17 of PM note. According to him deceased died due to shock as a result of extensive burns. He has

prepared PM note, which is on record at exh.19. A perusal of exh.19 PM note, it corroborates the oral testimony of Dr. Madhusudan Atmaram Patel, therefore it has to be held that the deceased died an unnatural death.

10. Now the next question would be whether the deceased died a suicidal death or a homicidal death, and if it is a homicidal death, then whether the prosecution has established that the Accused has poured kerosene on the person of the deceased and thereafter set her ablaze and caused her death.

11. In this connection, the prosecution has relied upon three sets of dying declarations. The first set of dying declaration is the oral dying declaration made by the deceased before four witnesses. The second set of dying declaration is in the nature of complaint given by the deceased to police officer, which is on record at exh.23 and the third set of dying declaration is before PW-9 Executive Magistrate, which is on recored at exh. 28.

12. Before appreciating the evidence of the witnesses, before whom the dying declarations were made by the deceased, it would be relevant to notice the law relating to dying declaration. In case of Paniben v/s State of Gujarat, 1993 (2) GLR, 985, the Supreme Court has formulated the principle laid down in several judgments of the Supreme Court governing dying declarations.

A Division Bench of this Court in the case of State of Gujarat v. Maniben, 2001 (2) GLR 1749, has very succinctly stated the law in this regard as under:

"Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit-worthy. Under section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinize all the dying declarations to find out if each of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity

attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at that point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration

requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true: (1) Was the victim in a position to identify the assailant/s? (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities? and (3) Whether any material part is proved to be false by other reliable evidence?"

13. In the light of the principles laid down in the above-referred to decisions, we may now proceed to consider the evidence on record relating to dying declarations and examine each of the dying declarations independently to ascertain the veracity of each declaration.

14. Now so far as the first set of oral dying declaration is concerned, the prosecution has tried to establish by examining four witnesses. They are PW-2 Gauriben Shivaji at exh. 14, PW-3

Kokilaben Keshavlal at exh. 15, PW-4 Rajubhai Hirabhai at exh. 16 and PW-5 Lakhansinh Fulsinh at exh. 17. A perusal of their evidence, it is seen that they have not supported the prosecution case with regard to dying declaration made by the deceased before them, wherein it is alleged that the deceased has stated that the Accused had poured kerosene on her person and thereafter set her ablaze. Therefore, all the witnesses were declared hostile and they were cross-examined at length by the learned APP confronting them with their previous statement made before the police. In the cross-examination they have stuck to the same version that the deceased had not made any statement before them.

15. It may be noted that, so far as PW-2 Gauriben Shivaji is concerned, though she was declared hostile she has stated in chief examination that on the day of incident at 1:30 to 2:00 pm clock, she saw that the Accused was running from his house and people were shouting that the Accused ran away after setting the deceased Kantaben ablaze. On overall appreciation of the evidence of PW-2, according to us, this is one of the circumstances, which suggests that the deceased ran after setting Kantaben ablaze and infact deceased Kantaben was found in burnt condition by this witness.

16. Now, so far as the second set of dying declaration is concerned, it is in the form of Complaint at exh. 23. In this connection, the

prosecution has examined and relied upon evidence of PW-8 Bhimjibhai R. Baranda, PSI at exh. 22. He has inter alia testified before the Court that on 12.12.1997 when he was on duty at Sardarnagar Police Station, he received a mobile message that one female has received burn injuries in Rameshnagar colony. He also came to know that she has been removed to Civil Hospital for treatment. He, therefore, went to Civil Hospital and he has taken the Complaint from her. A perusal of the complaint exh. 23, it is seen that the deceased Kantaben inter alia stated that the Accused no.2 was related to the husband of deceased Kantaben and she was occupying the house of Khemchand Kanaiyalal i.e. Accused no.2 and the Accused No.2 was in need of the said house and with a view to get possession of the said house he had instigated the Accused. The Accused tried to force Kantaben to vacate the house and on her denial the Accused poured kerosene on her person and set her ablaze. A perusal of the oral testimony of PW-8 and the complaint, there is no manner of doubt that both corroborates each other, therefore, there is no reason to disbelieve the written dying declaration made by the deceased before this witness, which is in the form of a complaint.

17. Now, so far as the third set of dying declaration is concerned, it was made by the deceased before PW-9 Baldevbhai Patel, Executive Magistrate, who has been examined at exh. 26. He has inter alia testified that he was serving as

a Mamlatdar in Ahmedabad City. He received the police Yadi for recording dying declaration of Kantaben in Civil Hospital. He, therefore, went there and after putting certain preliminary questions to Kantaben and after certifying by the Doctor that Kantaben was fully conscious, he had obtained endorsement of the concerned Doctor in this regard. Thereafter, he recorded her dying declaration in question-answer form, wherein she has also stated the same thing which she has stated in her complaint. It is also required to be appreciated that this witness has also stated that at the time of taking her statement, no relative of the deceased Kantaben was present. The dying declaration is on record at exh. 28. A perusal of the said dying declaration, there is no manner of doubt that it fully corroborates the testimony of this witness. It is also endorsed in the dying declaration that at the time of recording the dying declaration as well as time of completion of recording of dying declaration., no relatives were present and he has ascertained from the concerned Doctor that she was in conscious state of affairs.

18. On overall reappraisal of the evidence of two sets of dying declarations; one by the deceased before PW-8 Bhimjibhai R Baranda, PSI, i.e. the Complaint (exh.23) and the another made before PW-9 Baldevbhai Patel, Executive Magistrate, according to us, both the dying declarations are consistent and they corroborate each other.

There is no inconsistency in both the statements made by the deceased before both the public servants who have no enmity with the Accused and therefore, according to us, the trial Court has committed no illegality or infirmity in appreciating those two sets of dying declarations. On the contrary, the trial Court has correctly appreciated the evidence on record and reached to the just and correct conclusion. Therefore, it has to be held that the deceased died a homicidal death and there is no escape from the conclusion that the Accused poured kerosene on her person and then set her ablaze, and on receiving the burn injuries, Kantaben succumbed to the same. Therefore, the complicity of the Accused for commission of the offence of murder of Kantaben, punishable under Section 302 IPC is proved beyond reasonable doubt.

19. So far as the two reported decisions relied upon by Ms. Farhana Y. Mansuri, learned Advocate of the Accused in the case of Arvind Singh (supra) and the another in the case of State of Bihar (supra) are concerned, they rested on the facts of those reported decisions only. In those decisions, there was no proof of fit condition of victim to make the statement and witnesses tried to develop prosecution story by making addition while deposing before the Court. Therefore, in both the cases, dying declarations were disbelieved by the Courts.

20. In the instant case there is ample evidence on

record that the deceased was conscious and physically and mentally fit to depose before the Police Officer as well as before the Executive Magistrate and in that connection there is an evidence of PW-11 Dr. Arun Kailashchandra Adha at exh. 39, who had given opinion that the patient was conscious while recording dying declarations. Therefore, the two reported decisions relied upon by Ms. Farhana Y. Mansuri, learned advocate of the Accused are of no assistance to advance the case of the Accused that the deceased was not conscious and in a physically fit condition at the time while her dying declaration was recorded.

21. We find ourselves in complete agreement with the finding, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial Court, as according to us, no other finding, conclusion and order, is possible except the one reached by the trial Court, which is required to be affirmed by us.

22. Seen in the above context, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the trial Court, and as the Appeal lacks merit, deserves to be dismissed by confirming the judgment and order passed by the trial Court.

23. For the foregoing reasons, the Appeal fails and accordingly it is dismissed. Resultantly the judgment and order of conviction and sentence

dated 15.4.1999 rendered in Sessions Case No.99 of 1998 by the learned Additional City Sessions Judge, Ahmedabad, is hereby confirmed and maintained.

24. It is reported by Mr. R.C.Kodekar, learned APP for the Respondent – State of Gujarat that the Accused was released on a long term temporary bail for a period of six months w.e.f. 1.4.2004 vide order dated 26.3.2004 passed in Criminal Misc. Application No. 2275 of 2004 in Criminal Appeal No. 485 of 1999 by a Division Bench of this Court (Coram: B.J.Shethna and J.R.Vora,JJ), and as per the said order, the Accused has to surrender to jail authorities on 29.9.2004. However, he has not surrendered to jail authorities on that date, and since then he is absconding. Therefore, the jail authorities are directed to take effective steps to procure his presence to serve out the remaining sentence and the learned Additional Sessions Judge, City Sessions Court, Ahmedabad is also directed to issue non-bailable warrant against the Accused to procure his presence and send him to jail to serve out the remaining sentence.

(A.M.Kapadia,J)

(H.N.Devani,J)

Jayanti*